FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,
Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,
Appellees.

On Appeal from the Supreme Court of the State of Alaska

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

I

COMMENT ON FACTUAL STATEMENTS OF APPELLEES

Appellees maintain that the findings of the Alaska legislature concerning the purported purpose of Alaska Hire are both plausible and relevant.[1] They are wrong on both counts. Much of their argument turns upon this contention.

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[1] *See* AS 38.40.010, 020. App. p. 6.

Their position is contrary to the specific findings of the Supreme Court of the State of Alaska. That court recognized that Alaska Hire is simply an economic preference given to all Alaskans.

> We rely on the *McCready* 'natural resources exception' to the privileges and immunities clause. The trial court, on the other hand, upheld the law on the ground that it was not economic protectionism for its own sake, and so fell within the 'independent reasons' exceptions to the privileges and immunities clause articulated in the quotation from *Toomer, supra.* The trial judge referred to Alaska Hire as an attempt to solve 'problems that may be typified as social, racial, educational and economic.' We are hesitant to classify Alaska Hire as something other than an attempt to strengthen the Alaskan economy. In *Baldwin* v. *G.A.F. Seelig, Inc.,* 294 U.S. 511, 523, 79 L. Ed. 1032, 1038 (1935), a commerce clause case, the Supreme Court rejected an attempt to justify regulation of the price of imported milk by analogy to regulation of its purity, which would unquestionably be valid. We believe that the better alternative is to consider Alaska Hire an economic measure justified by the 'natural resources exception,' the principle that a state may prefer its residents in dealing with natural resources it owns. Juris. App. I, p. 19a.

The court also noted:

> The extent to which the Alaska Hire law in fact benefits unemployed Alaskans and those in job training is questionable. Alaska Hire does not distinguish among those who have been one-year residents; it gives all of them an absolute preference over those who are not one-year residents. A lifelong Alaskan employed in a private business or the public sector would be entitled to preference under Alaska Hire if he sought a new job. An unemployed person, or one who had just completed a private or public training course qualifying him for pipeline or petroleum employment, but who had taken an extended trip outside the state eleven months earlier, would be unable to obtain preference.
>
> * * * *
>
> The challengers point out that the least drastic, and also the most effective, means to help the unemployed and recent trainees to find jobs, is to give an employment preference only to the unemployed and recent trainees. Juris. App. I, pp. 9a-10a.

Appellants submit that the legislative findings here are transparently disingenuous. Alaska Hire is simply an across the boards preference given to all defined Alaska residents.

Appellees assert that the Alaska Supreme Court has said that "reducing unemployment and upgrading Alaska's human resources" is a compelling governmental interest that would pass strict scrutiny. But this language is from *State* v. *Wylie,* 516 P.2d 142 (1973), a government employment case that the majority of the Alaska Supreme Court below distinguished from this case.

> To state the differences between the facts of this case and *Wylie* is not to decide the issues. Juris. App. I, pp. 7a-9a.

II

COMMENT ON ARGUMENT OF APPELLEES

A. Privileges and Immunities.

Appellees noticeably fail to address what this Court has recognized in *Toomer* v. *Witsell,* 334 U.S. 385

(1948), and *Douglas* v. *Seacoast Products,* —— U.S. ——, 52 L.Ed.2d 308 (1977), as being the proper privileges and immunities test. "Under modern analysis the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution." *Douglas* v. *Seacoast Products, Ibid,* pp. 319-320. Instead, appellees maintain that there are valid "independent reasons" justifying discrimination against nonresidents. The asserted reasons are those which the court below rejected.

Appellees attempt to play down the scope of Alaska Hire, stating that "It applies *only* to that oil and gas related employment which arises from 'oil and gas leases, easements, or right-of-way permits for oil or gas pipeline purposes, unitization agreements or renegotiation of any of the preceding.' " Appellees' Brief, pp. 6-7 (emphasis in original). Even the court below conceded the breadth of the statute's coverage.

> Alaska Hire applies to the oil pipeline now in the final stages of construction. It will apply to any natural gas pipeline. Should any oil and gas leases ever be renegotiated, it will apply to them. It will apply to offshore oil and gas development under state leases. Juris. App. I, pp. 1a-2a.

The two dissenting justices pointed to the practical affect of Alaska Hire ("Only if qualified Alaska residents are unavailable, may others be employed.") and then noted the consequences of the "arises from" qualifier of appellees' definition.

> The provisions of this act apply also to all employment which is the *result* of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes and unitization agreements. Thus, the act appears to include employment opportunities at refineries and in distribution systems

> utilizing oil and gas obtained under Alaska leases. Juris. App. I, p. 23a (emphasis supplied).

The Act and regulations do not require that the State be an actual party as inferred by appellees. Alaska Hire by regulation is equally applicable to subcontractors and suppliers. The Act as codified states in part:

> Sec. 38.40.050. *Applicability of chapter.* (a) The provisions of this chapter apply to all employment which is a result of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972; however, the activity which generates the employment must take place inside the state and it must take place either on the property under the control of the person subject to this chapter or be directly related to activity taking place on the property under his control and the activity must be performed directly for the person subject to this chapter or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor. App., p. 8.

The regulations state:

> Suppliers. (a) *Suppliers shall have the same hiring requirements as an employer covered by this chapter, as to that portion of their supply business that is the result of a project or activity of a lessee, contractor or subcontractor.*
>
> (b) A supplier who provides delivery, installation or pre-operational testing of goods shall not be considered a contractor or subcontractor of the lessee or other person subject to AS 38.40. However, *a supplier who provides services for any person or business subject to AS 38.40 shall be considered a contractor or subcontractor and shall be subject to all requirements of AS 38.40 pertain-*

ing to contractors and subcontractors. 8 AAC 35.080. Juris. App. III, p. 53a (emphasis supplied).

Appellees conclude:

> Finally, Local Hire does not even bar non-residents from that employment which is subject to the Act. The Act only requires that Alaskan residents who are available and qualified to do the work be hired before non-residents.[5] Appellees' Brief, pp. 7-8.

Yet the majority of the court below found:

> The state also suggests that our scrutiny should be less strict because Alaska Hire does not bar non-residents from employment, but merely gives a preference to residents. But as long as there are available Alaska residents, it *is* a bar to those who cannot meet the residency standards. Be it bar or preference, the appellants have sought jobs on the pipeline, but have been unsuccessful because of the Alaska Hire law. A state labor official testified that about 74 percent of the pipeline workforce meet the Alaska Hire residency requirements. Juris. App. II, p. 11a (emphasis in original).

Appellees argue that if Alaska Hire will cause a Balkanization of the United States the residency preference created by some States for employment on public construction projects must have already lead to such a condition. Appellees' Brief, footnote 4. To the extent suggested this is true.[6] But the swath of Alaska Hire

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[5] 8 AAC 35.011, Juris. App. III, p. 39a, requires additionally that non-residents be first hired.

[6] There is a serious question about the validity of laws which require a residency preference in public construction projects. In *C.D.R. Limited* v. *Board of Education*, 412 F. Supp. 1164 (1976), aff. —— U.S. ——, 50 L.Ed.2d 742 (1977), a three judge

is much greater than that of public construction projects. It is applied to strictly private activities in which the State's interest is at best tangential.

Appellants do not quarrel with the proposition that State governments have the power to legislate concerning matters within their general police power. Nor do appellants deny the existence of the 10th Amendment. What appellants believe is that whatever action a State takes must be in conformity with the Constitution of the United States.

B. Commerce Clause Cases Are Helpful.

Appellees attempt to distinguish the analogous applicability of the commerce clause cases of *Oklahoma* v. *Kansas Natural Gas*, 221 U.S. 229 (1911), and *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923), on the basis that the natural gas there was privately owned. Appellees' Brief, p. 14. This fact is not relevant to the applicability of holdings that concern the regulation of natural resources within a State. In Alaska there is little private property and the State is the virtually exclusive owner of the resources. Instead of attempting to control the marketing of gas, Alaska restricts

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panel held that a New York statute granting a preference in employment in public construction projects to citizens over aliens who were lawfully admitted residents violated the equal protection clause of the 14th Amendment. Appellees have misunderstood the holding in *C.D.R.* as expressed in note 6 of their brief. The court did not uphold the validity of such residency preferences. The court recognized that the cases of *Heim* v. *McCall*, 239 U.S. 175 (1915) and *Crane* v. *New York*, 239 U.S. 195 (1915) were effectively overruled by *Graham* v. *Richardson*, 403 U.S. 365 (1971), and *Sugarman* v. *Dougall*, 413 U.S. 634 (1973). "*Crane* and *Heim* are not simply moribund; we believe they are dead. Otherwise the results in *Graham* and *Dougall* could not have been reached." 412 F.Supp. 1170.

employment with respect to the resources that it purports to own.

> "If the states have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? . . . If one state has it, all states have it; embargo may be retaliated by embargo and commerce will be held at its state lines."

Oklahoma v. *Kansas Natural Gas, supra,* p. 255. A similar phenomenon will be present if a State may restrict access to employment in such designated industries. "But rather let us say it is constituted of the welfare of all of the states, and that of each state is made greater by a division of its resources, *natural* and *created,* with every other state, and those of every other state with it." *Ibid* (emphasis supplied).

Appellees' similar criticisms of the commerce clause case of *Foster Fountain Packing Company* v. *Haydel,* 278 U.S. 1 (1928), is not well taken. Because of the common roots and purposes of the commerce clause and the privileges and immunities clause, there is found a natural and complimentary relationship of one with the other. Appellees fail to state why the language of these cases is not directly applicable by analogy to the privileges and immunities problem presented by Alaska Hire.

In note 23 appellees themselves cite the commerce clause case *Hughes* v. *Alexander Scrap Corporation,* 426 U.S. 794 (1976), for the proposition that as a State may participate in the market and exercise its right to favor its citizens over others, so the privileges and immunities clause was not intended to forbid a State

from requiring a preference for residents in employment in a job market which it has created. *Hughes* was a case in which a Virginia corporate scrap processor sued Maryland officials challenging the constitutionality of the Maryland junk automobile statute under which Maryland paid a bounty to scrap processors for the destruction of any vehicles formerly titled in Maryland. The law permitted Maryland processors to prove ownership of a hulk by a simple indemnity agreement while requiring non-Maryland processors to prove ownership by a certificate of title, police auction, or a licensed record certificate. Maryland contended, and this Court agreed, that there was a justification for the discrimination against non-residents because such discrimination, which made it easier for an in-State processor to prove title, tended to insure that the State's limited resources were protected and that the hulks abandoned did come from inside Maryland as opposed to from some contiguous State. The Court found that these assumptions were not irrational, under the lesser standard of the two-tiered equal protection test. Here any equal protection analysis concerning discrimination in employment because of residency is properly subjected to strict scrutiny, as appellants are members of a suspect class. *See* Argument II, Appellants Brief, p. 34.

Appellees contend that *Truax* v. *Raich,* 239 U.S. 33 (1915), "clearly acknowledges" that a State may regulate the use of its resources to preserve them for its own people. But Alaska Hire does not limit use of State owned resources; rather it requires discrimination against non-residents in private employment related to a resource industry. Appellees assert that this employment "owes its very existence to the State" and

suggests that this status places the jobs on exactly the same plane as residency requirements in public employment and public construction contracts. Regardless of the continuing validity of public employment and public construction contract preferences (*see* footnote 3, *supra*) Alaska Hire relates to employment in private industry. The premise that is advanced throughout appellees' brief is that but for the largesse of the State of Alaska, oil and gas jobs would not exist. Appellees are suggesting that the State has the authority to keep such resources locked up. The Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719, recognizes the strong national interest in Alaska gas. Alaska does not have the authority to stop resource extraction. *See Pennsylvania* v. *West Virginia, supra,* and *Oklahoma* v. *Kansas Natural Gas, supra.*

C. McCready v. Virginia.

Appellees maintain in Section III of their brief that *McCready* remains viable. They also assert, first, that employment is not a fundamental privilege and immunity and, second, that it has not been shown that the discrimination does not bear a close relationship to the purported reasons for it. With respect to these assertions, appellees are in fundamental error.

Appellees admit that the fundamental right analysis under the privileges and immunities clause encompasses a far broader range of rights than those that are termed fundamental for purposes of the 14th Amendment. In speaking of the fundamental privileges and immunities of State citizenship in *Corfield* v. *Coryell,* 6 F.Cas. 546 (C.C.E.D. Pa. 1823) Justice Washington recognized "The right of a citizen of one state to pass through, or to reside in the other state, for purposes of

trade, professional pursuits, or otherwise . . . ." *Ibid,* p. 552. Additionally, in *Ward* v. *Maryland,* 12 Wall. 418 (1871), this Court stated, "the clause plainly and unmistakeably secures and protects the right of the Citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation. . . ." *Ibid,* pp. 452, 453. And in *Paul* v. *Virginia,* 8 Wall. 168 (1869), the Court said that "it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and pursuit of happiness. . . ." *Ibid,* p. 180. The constitutional right of a citizen of one State to go to another State and work cannot be denied at this late date, and indeed must be deemed a fundamental right comprehended in the privileges and immunities clause. As suggested by appellees, the use of the word "fundamental" should perhaps be avoided, as Justice Washington's initial use of the word predated the Fourteenth Amendment. Stated differently, employment is within the scope of the privileges and immunities clause.

Appellants have argued, indeed the Supreme Court of the State of Alaska has found, that the means utilized in Alaska Hire does not bear any close relationship to purported ends of reducing unemployment. There can be no justification for a blanket employment preference to all residents in a purported attempt to address the problems of unemployed residents.

Appellees further assert that *McCready* has not in fact been effectively overruled by *Toomer* v. *Witsell,* 334 U.S. 385 (1948), *Mullaney* v. *Anderson,* 342 U.S. 415 (1952), and *Douglas* v. *Seacoast Products,* —— U.S. ——, 52 L.Ed.2d 304 (1977). Appellants disagree

for the reasons stated in their brief. Notwithstanding, *McCready* is inapplicable to Alaska Hire as it narrowly concerned access to oyster beds, not employment in the oyster industry. In note 15 appellees assert that this Courts' action in *Mullaney* v. *Anderson,* 342 U.S. 415 (1952) was because of "the Territory of Alaska's failure to provide any evidence justifying it (a license differential) and not because the difference was excessive as in *Toomer.*" This stems from the assertion that no mention of *McCready* is made in *Mullaney,* and thus that the Court simply followed *Toomer* unaware of *McCready.* Appellees ignore that the *Toomer* Court fully discussed and effectively overruled *McCready.*

Appellees' citation of the concurring opinion of Mr. Justice Frankfurter in *Toomer* in support of their position that the State may utilize its resources on behalf of its own citizens is inappropriate. Appellees maintain that "Alaska's claim is as solid and real as the land on which the Transalaska Pipeline is built," and then, in Footnote 19, assert:

> It appears that this case is the first privileges and immunities case involving a state's regulating the distribution or use of *land* which it owns in favor of its residents to be decided by this Court since *McCready* in 1877.

This case does not concern State regulation of the distribution or use of land that it owns in favor of its residents. This case concerns discrimination against the residents of other States in private employment in the oil and gas industry. Appellants believe that Alaska Hire is the specific type of discrimination that the privileges and immunities clause was designed to prohibit.

Appellees assert that *even* if Alaska Hire does violate the privileges and immunities clause, the law is still

sound because the privileges and immunities clause is not absolute, citing *Toomer* v. *Witsell, supra,* p. 396. They assert that *Toomer* permits discrimination against non-residents in violation of the privileges and immunities clause when there are independent reasons for the disparity of treatment and when the degree of discrimination bears a close relation to these reasons. Appellees' Brief, p. 33. Appellants believe that this is a misreading of *Toomer.* The privileges and immunities clause does constitute an absolute bar against certain *categories and types* of discrimination of which it is asserted Alaska Hire represents one. The proper contemporary test is simply if Alaska has exercised its purported police power in conformity with the Constitution.

Alaska Hire as this Court should view it does not even meet the test suggested. Appellees' argument is based upon a misunderstanding of what the Alaska Supreme Court has held. The Alaska Supreme Court found that Alaska Hire is simply an across the board economic preference for all Alaskans, *not* just those unemployed. It is that court's interpretation of State law, and not the asserted "independent reasons" of reduction of the State's traditionally high rate of unemployment and development of human resources, upon which this Court should focus.

III

ALASKA HIRE VIOLATES THE FOURTEENTH AMENDMENT

A. Non-residency Is Comparable To Alienage.

Appellees argue that the alien cases cited involved residents of the States and that the cases therefore turned on discrimination by a State between classes of its residents. The use of the word "resident" should be

clarified in this analysis. A resident for purposes of Alaska Hire means a domicilary citizen of the State of Alaska.[4] A resident in the alienage case means a foreign national who is lawfully present in the State. An alien by definition cannot be a domicilary. Citizens of other States traveling to Alaska to find employment may be considered residents under the alienage definition of residency but not under Alaska Hire's. Therefore a citizen of Canada residing in Alaska can not be discriminated against in oil and gas employment but a citizen of another State residing in the same manner in Alaska may be discriminated against according to Alaska Hire.

B. Right To Travel.

Appellees also assert that the right to travel cases involve discrimination between classes of residents, and are therefore inapposite. As appellants have stated in their brief, Alaska Hire may indeed no longer burden those who in fact have recently migrated to Alaska to become permanent residents and have lived there for thirty days. However, Alaska Hire does inhibit travel to Alaska by citizens of other States who do not wish to become permanent residents of Alaska or who are undecided. *See* Appellants' Brief, p. 44. Any attempt to find oil or gas related employment is effectively foreclosed unless there is an affirmative commitment to permanent residency. The right to migrate, resettle, find a job and start a new life is discouraged, not casual travel. There is no proper justification for requiring migration with domicilary intent as a prerequisite to obtaining a new job.

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[4] *See* A.S. 38.40.090, App. p. 12.

C. Contractual Rights.

Appellees' arguments concerning the State's contract power as an independent basis for the validity of Alaska Hire is specious. This argument was specifically rejected by the Supreme Court of Alaska:

> The state offers as an alternative justification for Alaska Hire, in addition to its police power, the state's own proprietary power over the resources it owns. The state asserts it is not subject to the equal protection clause in the management of its property. This is not the law. State v. Wylie, 516 P.2d 142, 146 (Alaska 1973), made it clear that the state in its capacity as *employer* must obey the Fourteenth Amendment. The state as a trustee of property must obey the Fourteenth Amendment. Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230, 1 L.Ed.2d 792 (1957). The Fourteenth Amendment applies equally to a state or city using the police power to regulate private business (Turner v. City of Memphis, 369 U.S. 350, 7 L.Ed.2d 762 (1962) (racial segregation in restaurants)) and using its proprietary powers to manage its own property (Holmes v. City of Atlanta, 350 U.S. 879, 100 L.Ed. 776 (1955), *vacating* 223 F.2d 93 (5th Cir.) (racial segregation of municipal golf courses)). Juris. App. I, pp. 9a-10a.

IV

COMMENT ON BRIEF OF AMICUS CURIAE STATE OF HAWAII

The brief submitted by the State of Hawaii provides a helping showing of the dangers of Alaska Hire and how other States predictably will act if it is allowed to stand.

In its brief Hawaii asserts that it has unique problems and concerns because of its "significant cultural

and ethnic composition and a very high rate of unemployment." Hawaii Brief, p. 2. Hawaii asserts that it has the right as a State to limit what it terms as "in-migration":

> With increased in-migration higher unemployment results. More people must be supported at public expense.

Speaking directly of Alaska Hire, the Hawaii Brief states:

> If the Alaska Hire law is struck down, not only will chronic unemployment rise, but a state, having lost control over its ability to maintain the welfare of its people, would be powerless to avoid the onset of an economic recession, aggravated by migrating job seekers. Hawaii Brief, p. 3.

Hawaii believes that because of uniqueness it is entitled to set itself apart from the rest of the States and actively discourage immigration. Predictably, it would be difficult to find a State that did not believe it was unique, with its own unique problems which are entitled to exclusive solution in accordance with its history and life. If Hawaii can limit in-migration to preserve its uniqueness any State can and will. Alaska Hire is a functional if not actual attempt to accomplish a similar end.

It appears that Hawaii may not necessarily be concerned with constitutional law. On December 16, 1977, United States District Judge Samuel T. King issued a preliminary injunction enjoining the enforcement of the durational residency aspect of Act 211 which appears in Appendix 1 of the State of Hawaii's Brief. On page two of his twenty-four page opinion, Judge King noted:

> In January of 1977, defendant Ariyoshi, the Governor of Hawaii, expressed his willingness to 'put the state in direct confrontation with the present laws of this land and possibly even the Constitution of the United States'. He called for 'bold . . . ideas and actions' to combat the problem of potential overpopulation in Hawaii. In response the legislature enacted a new, one-year durational residency requirement for public employment. Although no survey was ever made to ascertain the number of public employees who were residents of the state for less than a year, the Governor signed a law that became effective on June 21, 1977.

The corresponding reasoning of the Hawaii Brief maintains:

> Hawaii, like Alaska, is faced with the real prospect of irretrievably losing many of its natural assets vital to its welfare unless immediate action is taken.
>
> The Alaska Hire Law has a clear rational basis in giving a state the means to avoid becoming a depressed area, with a population far out of proportion to its resources. The State of Hawaii submits that the statute meets valid, legitimate state interests. These interests must be addressed by the states while the Congress of the United States for the first time in our nation's history must attempt to address the problems created by a continually increasing population and rapidly diminishing natural resources.
>
> These twin problems of finite resources and of population growth and redistribution must ultimately be addressed. If these concerns are submerged, if states like Alaska and Hawaii are unable to respond to these problems merely because a few appellants talk in overly strident tones of

> "Balkanization" or "parochialism," then the states could very well forget about the Federal system that was created to meet their often very individual needs, while they await further Congressional action. Hawaii Brief, pp. 8-9.

This insular approach to perceived State problems can not be in accordance with the Framers' intentions. Mr. Justice Brandeis's observations in *Baldwin* v. *Seelig,* 294 U.S. 511, 523 (1935) seems a more appropriate response: "The constitution was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

V

CONCLUSION

For the reasons stated this Court should find Alaska Hire to be repugnant to the spirit of Federalism and the Constitution of the United States.

SUBMITTED this 17th day of March, 1978.

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